94-35

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

STATE OF ALABAMA, James E. Folsom,
Governor of the State of Alabama,

Petitioners,

v.

POARCH BAND INDIANS, the Poarch Band
of Creek Indians,

Respondents.

**On Petition For Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA ALASKA, ARKANSAS, COLORADO, CONNECTICUT, FLORIDA, IDAHO, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TEXAS AND WYOMING IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Upon dismissal of a suit on Eleventh Amendment grounds, may an Indian tribe directly request the prescription of gambling procedures from the Secretary of Interior?

II. Does Eleventh Amendment immunity invalidate statutory provisions, allowing the courts to fashion new remedies not prescribed by statute?

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INTEREST OF AMICI STATES

Amici States of the Union now face the prospect, as a result of Part V of the decision of the Court of Appeals,[1] that Indian tribes will bypass procedures established by the Congress for the negotiation and completion of tribal-state compacts for serious gambling on Indian lands in those states. While holding principally that the Eleventh Amendment bars suit by an Indian tribe in federal court against an unconsenting state, the Eleventh Circuit added – almost as an afterthought – that the tribe may notify the Secretary of Interior whenever such a suit is dismissed, and the secretary may prescribe gaming. This legal error converts the States' Eleventh Amendment sovereign immunity into a means to subvert the will of Congress and the sovereignty of the states. Moreover, this judicially-created remedy allows the tribes to request that the Secretary prescribe casino gambling, even in states where it is criminally prohibited, on Indian lands, again contrary to the will of Congress and the sovereign states and principles of federalism. Indeed, the tribes and the Secretary may use the *states'* judicial sovereign immunity as a sword to bypass the tribal-state compacting procedures envisioned by Congress and impose as a matter of federal regulation the gambling requested by tribes.

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[1] Case below consolidated under *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994), holding principally that Eleventh Amendment is a bar to suit by an Indian tribe in federal court against an unconsenting State (Part IV). The consolidated decision reversed the district court decision in *Seminole Tribe of Florida v. State of Florida*, 11th Cir. No. 92-4652, and affirmed *Poarch Band of Creek Indians v. Alabama*, 11th Cir. No. 92-6244. 11 F.3d at 1029.

Congress provided for such a secretarial remedy only upon the judicial finding of a lack of good faith by a state to negotiate for that gambling which the state must negotiate. However, experience shows that upon a state's good faith refusal to negotiate for that gambling which it criminally prohibits for all purposes, such as blackjack, slot machines or electronic games of chance, tribes have sued states in federal court claiming a lack of good faith, evoking an Eleventh Amendment defense. The legal error of the court leaves states in the untenable position of facing tribal demands for casino gaming that is criminally prohibited in those states, followed by suit in federal court when the states do not negotiate for the criminally-prohibited gaming. By purposefully evoking a defense of sovereign immunity, tribes may *ab initio* bypass altogether the requirement to negotiate a tribal-state compact, leaving states subject to unbridled federal power to impose a scheme that may be entirely contrary to the states' criminal law.

Amici states believe the Court of Appeals legally erred in this case by reading into a federal statute a remedy for tribes that does not exist and which properly could not have been fashioned in the absence of any Congressional direction. Amici states have an acute interest in the proper determination of the questions presented by the Petition for Certiorari.

SUMMARY OF ARGUMENT

States are subject to the provisions of the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2701, *et seq.*, and 18 U.S.C. § 1166, *et seq.*[2] As provided by IGRA, states must negotiate tribal-state compacts with Indian tribes for class III gambling activities (all significant gambling beyond bingo and non-banked card games), and face suits by tribes in federal court to enforce the negotiating process. The Court of Appeals' final statement in Part V of the opinion that the tribes may notify the Secretary of Interior (and that the Secretary may then act to prescribe procedures for class III gaming) whenever such a suit is dismissed for subject-matter jurisdiction on Eleventh Amendment grounds is not supported by the statute and arrogates to the Secretary powers not delegated to that official by the Congress.

The states welcome the Court of Appeals' principal holding that an unconsenting state may not be sued in federal court by an Indian tribe under IGRA, as it goes to the heart of the constitutional scheme balancing the powers of the states and the Federal Government. However, the Court's final statement concerning the tribe's remedy and the Secretary powers is inconsistent with the congressional directive and adversely affects the states. As the case before the courts is to be dismissed for subject matter jurisdiction, the court below was not free to engage in an analysis of severability or to fashion a remedy not envisoned by the Congress. For that reason, amici states respectfully urge this Court to reverse and remand the ruling in Part V of the opinion.

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[2] Amici states Maine, Massachusetts, and Rhode Island contend they are not subject to IGRA, based on their respective Indian land claims settlement acts.

ARGUMENT

I.

UPON DISMISSAL OF A SUIT UNDER IGRA ON ELEVENTH AMENDMENT GROUNDS, AN INDIAN TRIBE IS NOT ENTITLED TO THE PRESCRIPTION OF GAMING PROCEDURES BY THE SECRETARY OF INTERIOR

The Court of Appeals, in Part V of the opinion, incorrectly states that where a state "pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, *pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary may then prescribe regulations governing class III gaming on the tribe's lands.*" *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); italics added. This procedure, however, does not appear in 25 U.S.C. § 2710(d)(7)(B)(vii), as cited,[3] or anywhere else in IGRA.

At the beginning of Part V of the opinion, the Court of Appeals notes that the procedures in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) necessarily fail when an unconsenting state refuses to consent to suit. *Seminole*, at 1029. This logically follows the Court's holding that the Eleventh Amendment serves as a jurisdictional bar to suit against an unconsenting state. *Ibid.* However, following the adoption of a severability analysis, the Court of Appeals reasoned that the final clause of section 2710(d)(7)(B), clause (vii), provided below, is somehow unaffected by the jurisdictional bar. By its plain language,

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[3] All cited sections refer to Title 25 of the United States Code.

however, that clause like the clauses preceding it, is inextricably tied to the jurisdiction of the federal court. As is evident, it is tied to the very clauses preceding it, from which it derives its meaning. Clause (vii) provides:

> "If a State does not consent during *the 60-day period described in clause (vi)* to a *proposed compact submitted by a mediator under clause (v)*, the *mediator shall notify* the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –
>
> "(I) which are *consistent with the proposed compact selected by the mediator under clause (iv)*, the provisions of this Act, and the relevant provisions of the laws of the State, and [] (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribes has jurisdiction."

Italics added.

Clearly, IGRA, at § 2710(d)(7)(B)(vii), contemplates the continuation of the process initiated with the lawsuit in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi). It is the *court-appointed mediator*, not the tribe, who notifies the Secretary of Interior, and only upon the refusal of a state to consent to the compact proposed by the mediator in clause (v).

The Secretary, in turn, is empowered solely to respond to a mediator's notification and may prescribe only those class III gaming procedures *consistent with a proposed compact selected by a mediator*. 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Congress did not provide that tribes would be authorized to notify the Secretary directly with a request for class III gaming. Nor did it provide the Secretary with powers to prescribe gaming

procedures independent of a court-appointed mediator's selected compact. Congress envisioned these procedures as a *limitation* upon the Secretary of Interior, following multiple opportunities to resolve outstanding differences between a state and tribe once litigation has arisen. To provide a remedy independent of the statutory process would be like proceeding to sentencing once a criminal defendant asserts the protection of the Fifth Amendment. Congress attempted to provide a process which protected the significant interests of the parties. Indeed, Congress noted the entire § 2710(d)(7) was

> " . . . the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of the States in regulating such gaming."

Senate Report 100-446, S. 555, 100th Cong., 2d. Sess., 14.

The Committee noted that the provision permitting the tribe to sue the state on the basis of a lack of good-faith negotiation was designed as the least offensive option "to encourage States to deal fairly with tribes as sovereign governments," *ibid.*, but also noted that the state had legitimate governmental interests to protect, including an interest in regulating class III gaming. Congress made no provision for the Secretary to substitute his discretion for that of the state, particularly in deciding important and difficult issues of state gambling law. It instead limited the Secretary to actions consistent with the exercise of a mediator's discretion. Congress could have provided an alternate means for the tribe to request class III gaming from the Secretary and for the Secretary to respond to that request, but Congress did *not* provide any such mechanism. The Court of Appeals is not free to

fashion remedies that Congress has specifically chosen not to extend. *Landgraf v. USI Film Products*, ___ U.S. ___, ___, n. 36, 62 U.S.L.W. 4255, 4267, n. 36 (April 26, 1994); see *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77, 97 (1981).

Amici states now face the prospect that the Court of Appeals' statement, will be offered by Indian tribes to the Secretary of Interior as a by-pass mechanism to serious negotiations and a new judicially-created protocol for the Secretary to entertain requests for class III gaming. The difficulty arises whenever a state refuses to concede to tribal demands for casino-type class III gaming which violates state law, but which a tribe maintains is "part of the public policy of the state" under *Cabazon Band of Mission Indians v. California*, 480 U.S. 202 (1988). In California and Texas, federal district courts have opined that certain casino-type games are properly the subject of negotiations, notwithstanding the criminal prohibitions on this activity. See, e.g., *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1503 (S.D. Cal. 1992). Where the state believes that it need not negotiate for such activity, it faces the prospect of a lawsuit by the tribe for failure to negotiate in good faith, with the possibility of an unwanted mediation and secretarial procedures consistent with an appointed mediator's decision. Under such conditions, the unequal burden is on the state, which must then concede to the tribal demands or face the possibility that an appointed mediator's discretion will be substituted for the discretion of the state. It is under these and similar circumstances that certain states have raised the Eleventh Amendment as a bar to the lawsuits. In other states there are constitutional or other internal impediments to the express waiver of state sovereign immunity.

In any case, states have no reason to expect that upon dismissal of a suit for lack of subject-matter jurisdiction the Secretary of Interior has the unfettered power to consider tribal requests for class III gaming, as this is simply not evident in the statute. Instead, the Secretary's powers rest on the jurisdiction of the federal court to order compact negotiations and appoint a mediator, who, in turn, must follow statutorily-prescribed procedures before the Secretary may act upon the appointed mediator's notification and compact selection. Congress specifically granted the Secretary limited *regulatory* discretion in § 2710(d)(7)(B)(vii), namely, to prescribe consistently with an appointed mediator's compact selection; in this subsection, the Secretary has no power to decide a matter involving *legislative* discretion, such as what class III gaming to permit or not permit. See *American Federation of Gov. Employees v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982). While broad delegations of power have been upheld, see *Mistretta v. United States*, 488 U.S. 361, 373-374 (1989), by contrast here, IGRA grants a narrow *regulatory* discretion to the Secretary. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415-430 (1935).

II.
ELEVENTH AMENDMENT IMMUNITY IS A JURISDICTIONAL BAR AND DOES NOT INVALIDATE STATUTORY PROVISIONS AS UNCONSTITUTIONAL

The court-fashioned secretarial remedy discussed above is apparently premised on the Court of Appeals' conclusion that the lawsuit and mediation provisions in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) were severable from

IGRA. Amici states submit the severance analysis is legally incorrect. In concluding that the Eleventh Amendment serves as a jurisdictional bar in IGRA, the Court of Appeals has upheld the states' sovereign immunity as a defense to certain actions. The Court of Appeals did not, however, hold the lawsuit and mediation provisions in IGRA to be unconstitutional. In fact, in footnote 15, the Court below noted that a state may consent to suit, "*in which case these provisions remain in full force.*" If the provisions remain in full force for states consenting to suit and are barred for lack of subject-matter jurisdiction for states not consenting to suit, the provisions are not unconstitutional; the Court of Appeals did not invalidate them. As the Court of Appeals decided, the provisions are subject to a *defense* of lack of jurisdiction in certain cases. Were the provisions invalid as contrary to the Constitution, they should be dropped altogether. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Unconstitutional provisions must be severed from the statute. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 685 (1987). However, the lawsuit provisions of IGRA cannot be unconstitutional and severable on the one hand and "*remain in full force*" here and there, as acknowledged by the Court of Appeals, *Seminole*, n. 15.

By upholding the constitutional validity of the Eleventh Amendment as a jurisdictional bar, the Court of Appeals determined that the case must be dismissed for lack of subject-matter jurisdiction. Thus, it cannot properly reach the question of severability or whether other remedies might work for the tribe under IGRA. Indeed, upon affirmance of the dismissal for lack of subject matter jurisdiction, there is no further "case or controversy," within the meaning of Article III, § 2, clause 1, of the

Federal Constitution, before the Court of Appeals. The court cannot give decisions which are primarily advisory, nor can it exercise functions which are essentially legislative. *Federal Radio Com. v. General Electric Co.*, 281 U.S. 464, 469 (1930); *Flast v. Cohen*, 392 U.S. 83, 95 (1942).

As the bar of the Eleventh Amendment is jurisdictional, once the action is found to be barred, a severance analysis and further interpretation is inappropriate. See *Apache Tribe of Mescalero Reservation v. New Mexico*, CIV 92-076-JC, Slip Op. at 2 (DC N.M., Dec. 22, 1992).[4] Further, dismissal on Eleventh Amendment grounds bars the consideration of the merits of the underlying action. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605, 613 (1993); *United States v. Sisson*, 399 U.S. 267, 270 (1970). Here, the Eleventh Circuit, upon affirming the *Poarch Band* dismissal on Eleventh Amendment grounds, continued with a severance analysis and substantive commentary, including the creation of a judicial remedy not expressed by the Congress. This analysis and the creation of a remedy not found in IGRA has far-reaching and destructive consequences to significant State governmental interests.

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[4] " . . . it would be improper for this Court to address the severability issue raised by the Apache Tribe of the Mescalero Reservation [having] already found that the Eleventh Amendment precludes this action in federal court absent waiver by the State of its immunity in a federal forum." *Apache Tribe*, Slip Op. at 2.

CONCLUSION

For the reasons stated herein, amici states respectfully urge this Court to reverse and remand the case with instructions to eliminate Part V of the opinion below.

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